CASE NOTES

THE RIGHT TO EDUCATION: *UNIVERSITY OF CALIFORNIA V. BAKKE*

To act justly in the present and future, the past must be recalled because in large measure it shaped present conditions. The courage, resources, and commitment necessary to attain justice for blacks require that people of the current generation fully understand the pale shadow which the history of slavery, discrimination and racism casts over the present. This is particularly important in analyzing the affirmative action concept and policies in higher education.

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I. INTRODUCTION

The *Bakke*[1] case has been the subject of considerable comment, both in the popular media and scholarly journals.[2] Since the Supreme Court's decision was split on the various issues involved, there will surely be more discussion and litigation about the impact of its meaning. This Note will summarize the various *Bakke* opinions and explore its impact on the standards for judicial review under the equal protection clause. The decision will then be analyzed to consider its implications for future affirmative action programs in higher education.

II. FACTS

In 1973 and again in 1974, Allan Bakke was denied admission to the University of California at Davis School of Medicine (UCD). At the time Bakke applied, UCD had a special admissions program which reserved 16 of 100 seats in each entering class for members of minority groups.[3] Candidates could have their applications processed under either the "regular" or the "special" admissions program. The two programs operated with sepa-

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* K. TOLLETT, FOREWARD: THE LENGTHENING SHADOW OF SLAVERY (1978).

1. Univ. of California v. Bakke, 438 U.S. 265 (1978).

2. For a discussion of issues raised by the *Bakke* case, *see generally* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Hughes, *Equality in Fact vs. Equality of Opportunity*, 23 WAYNE L. REV. 1203; Greenawalt, *Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro*, 61 NW. U.L. REV. 363 (1966); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 U.C.L.A. L. REV. 343 (1974); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Sedler, *Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California*, 17 SANTA CLARA L. REV. 329 (1977); Seeburger, *A Heuristic Argument Against Preferential Admissions*, 39 U. PITT. L. REV. 285 (1977).

3. Originally the category was called "disadvantaged" students, but was changed to "minority" students in 1974 and included Blacks, Chicanos, Asians, and American Indians. Univ. of California v. Bakke, 438 U.S. 265, 275 (1978).

rate committees. After preliminary rejections were made, remaining applicants were interviewed by subcommittees of the admissions program under which they were being considered and given a numerical ranking. Until the 16 slots were filled, recommendations of the special committee were submitted to the general committee which made all final decisions.

When his 1974 application was denied, Bakke filed suit in the Superior Court of California seeking mandatory, injunctive, and declaratory relief. He claimed that the Davis admissions plan violated his rights under the equal protection clause of the fourteenth amendment,[4] the California Constitution,[5] and Title VI of the Civil Rights Act of 1964.[6] The University filed a cross-complaint seeking a declaration that its program was lawful. The trial court held the UCD admissions program unconstitutional but refused to order Bakke's admission because he did not prove that he would have been admitted in the absence of the special admissions program. Both Bakke and UCD appealed.[7]

Without passing on federal statutory or state constitutional grounds, the California Supreme Court held that the program violated the fourteenth amendment.[8] Justice Mosk, speaking for the majority, said that racial classifications should always be subjected to strict scrutiny, and that the special admissions program served a compelling state interest in increasing minority doctors, but that there were at least three means less restrictive than the Davis plan for accomplishing these goals.[9] Justice Tobriner dissented.[10] The California Supreme Court also held that the burden of proving that Bakke would not have been admitted, even in the absence of the special admissions program, should have been assigned to the University. Since the University conceded that it could not meet the burden, the California Supreme Court ordered Bakke's admission.[11]

The Supreme Court granted certiorari on February 22, 1977 and heard oral arguments in October, 1977.[12] On June 28, 1978 a divided Court announced its decision, affirming those portions of the California Supreme Court's judgment that directed Bakke's admission and ruled that the Davis program was unlawful, but reversing the state court's judgment prohibiting

4. "[N]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

5. "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." CAL. CONST. art. 1, § 7.

6. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in . . . any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1964).

7. Bakke v. Univ. of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

8. *Id.* at 63, 553 P.2d at 1172, 132 Cal. Rptr. at 700.

9. The less restrictive means included more flexible admissions standards, considering disadvantaged applicants without regard to race, and increasing the size of the entering class. *Id.* at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694.

10. *Id.* at 63, 553 P.2d at 1172, 132 Cal. Rptr. at 700. Justice Tobriner concluded that racial classifications are not subject to strict judicial scrutiny if used to "promote integration or overcome the effects of past discrimination." Using the rational relationship test, Tobriner found that the racial classifications at issue were reasonably related to the compelling state interest in promoting integration.

11. *Id.*

12. For a summary of oral arguments, see 46 U.S.L.W. 3249 (Oct. 18, 1977).

the University from considering race in any manner in its admissions process.[13]

III. The Bakke Opinions

The Supreme Court Justices wrote a total of six separate opinions in *Bakke*. Justice Powell wrote the plurality opinion.[14] Justices Brennan, White, Marshall, and Blackmun wrote a joint opinion (joint opinion) concurring in the reversal of that part of the judgment which held that Davis could never consider race in its admissions program, but dissenting from the plurality opinion's invalidation of racial quotas.[15] Justice Stevens, joined by Chief Justice Burger and Justices Rehnquist, and Stewart, concurred in the judgment that the University's program was unlawful under Title VI of the Civil Rights Act, and in the ruling admitting Bakke, but dissented from the plurality decision insofar as it sanctioned the use of race as a factor in admissions decisions.[16] Justices White, Marshall, and Blackmun, also filed separate opinions.[17]

Justice Powell's opinion, which garnered two separate majorities, was divided into six parts. Part I summarizes the admissions plan, Bakke's complaint, and the lower court decisions; Part II is a discussion of Title VI of the Civil Rights Act of 1964; Part III focuses on the level of scrutiny that should be applied to the UCD admissions plan; Part IV is an analysis of the compelling state interest served by the program; Part V considers whether there is a less restrictive means to accomplish the state interest; and Part VI affirms Bakke's admission.

In Part II, Justice Powell considered Title VI because of the Court's announced doctrine that it will not decide constitutional issues if a decision on statutory grounds is possible. Justice Powell concluded that it was unnecessary to decide whether Bakke had a private right of action under Title VI; that Section 601, the equal protection statement in Title VI, was not for the sole protection of Blacks, but had a broader application; and that the discrimination proscribed by the statute was to be tested by the same standards applicable to the fourteenth amendment's equal protection clause.[18]

In Part III, Justice Powell decided that racial quotas are inherently suspect and must be subjected to strict scrutiny. This aspect of the opinion will be explored in greater depth in the next section.[19]

Part IV examined the compelling state interests advanced by the University and rejected three of them—preference for no reason other than race, eliminating discrimination where there is no finding of past discrimination by administrative bodies, and increasing health care to underserved communities merely by increasing the number of minority doctors. Based on the University's historical academic freedom, he found a compelling state interest in maintaining a diverse student body.[20]

13. Univ. of California v. Bakke, 438 U.S. 265, 271-2 (1978).
14. 438 U.S. at 269.
15. *Id.* at 324-379.
16. *Id.* at 408-421.
17. *Id.* at 379-408.
18. *Supra* note 8.
19. *Infra* at 1706.
20. See note 41 and accompanying text, *infra*.

In Part V Justice Powell concluded that there is a less restrictive means to accomplish the compelling state interest in a diverse student body. He suggested the Harvard undergraduate admissions plan, where race is one of many factors considered in selecting the entering class. "No . . . facial infirmity exists in an admission program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process."[21] For this reason, in Part VI Powell agreed with the California Supreme Court that UCD plan was unlawful, but rejected the lower court's holding that the University could never consider race in its admission process.

In their joint opinion, Justices Brennan, White, Marshall, and Blackmun voted to reverse the California Supreme Court in all respects. They discussed Title VI, the level of scrutiny to be applied to the University's classification, and the appropriate tests under that level of scrutiny. In discussing Title VI, the Justices maintained that it "does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination . . . ."[22] They found that the congressional intent of Title VI was to give the Kennedy Administration power to cut off federal funds to programs which segregated Blacks and Whites or absolutely denied benefits to Blacks, and that the Department of Health, Education, and Welfare has interpreted corrective measures using racial preferences as "fully consistent with the statute's emphasis on remedial action . . . ."[23] The Justices concluded that "prior decisions of this Court also strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible."[24]

Criticizing the "color-blind" interpretation of the fourteenth amendment, the Justices said that racial classifications are not *per se* invalid under the equal protection clause, yet added that such classifications should be subjected to strict scrutiny. But the strict scrutiny advocated in the joint opinion was not the traditional strict scrutiny that usually results in rejection of any racial classifications, as discussed below.[25]

Justice Marshall's separate opinion began with a history of the fourteenth amendment in the context of the Reconstruction Period. He then discussed the period during which the equal protection clause lay judicially dormant, and its subsequent rebirth in the school desegregation cases. Justice Marshall also discussed the current disparity between Blacks and the rest of American society in jobs, housing, and life expectancy. The Constitution, according to Justice Marshall, does not bar remedial measures designed to make up for the legacy of discrimination. He reemphasized the joint opinion's assertion that race-conscious quotas have previously been permitted as remedial measures. He concluded by expressing his displeasure with the Court's failure to recognize a "class-based" remedy for past discrimination: "In declining to so hold, today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not

21. *Id.* at 318.
22. *Id.* at 328.
23. *Id.* at 345.
24. *Id.* at 350.
25. *Infra* at 1706-1708.

as individuals, but rather solely because of the color of their skins."[26]

Justice Blackmun's separate opinion focused on the scope of the equal protection clause, and also maintained that the disparities between Black and White Americans are proof that it is not time to dismantle affirmative action programs. Justice Blackmun agreed with the test for judicial scrutiny of racial classifications described in the joint opinion, and he added that the Court's interpretations should be guided by the period in which cases are decided.

Justice White's separate opinion and Justice Stevens' opinion, joined by Justices Burger, Rehnquist, and Stewart only considered the availability of a private right of action under Title VI. Justice White concluded that no such right exists. Taking a different view, Justice Stevens determined that Title VI protects all persons, regardless of whether they suffer a racial stigma, and that a private right does exist under the statute. Justice Stevens concluded that the University's admissions policies did violate Title VI and that Bakke should have been admitted. He dissented from the portions of Justice Powell's plurality opinion which considered racial criteria, concluding that the issue was not before the Court because "[T]here is no outstanding injunction forbidding any consideration of racial criteria in processing applications.[27]

IV. STANDARDS OF JUDICIAL REVIEW FOR RACIAL CLASSIFICATIONS

A. *The Three Tiers*

To review claims of equal protection violations, the Court generally applies one of two standards of review: "strict scrutiny" or "minimum scrutiny." If a suspect classification is used or a fundamental interest is involved, the strict standard applies.[28] Under that standard, state classification or state interference with fundamental rights must be justified by compelling governmental interests.[29] After the state satisfies the burden of justification, the Court determines whether the same interest may be accomplished by less onerous means, balancing the state interest against the interference with constitutionally protected rights. Application of the strict scrutiny test usually results in a finding of unconstitutionality.[30]

Under the minimum scrutiny test, the Court only requires that state action be reasonably related to a legitimate state purpose.[31] When this standard (known as the rational relationship test) is applied, state classifications have been almost always upheld.

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26. 438 U.S. at 400.

27. 438 U.S. at 411.

28. Suspect classifications generally include, but are not limited to nationality, Korematsu v. United States, 323 U.S. 214, 216 (1944), and race, McLaughlin v. Florida, 379 U.S. 184 (1964). Fundamental rights, usually rights stated or implied by the Constitution, include, but are not limited to association, Police Department of Chicago v. Mosley, 408 U.S. 92, 101 (1972) and privacy, Roe v. Wade, 410 U.S. 113 (1973).

29. Korematsu v. United States, 323 U.S. 214, 220 (1944).

30. The notable exception is *Korematsu*, where the use of a racial classification was upheld by the Court. For a historical perspective of the two-tiered test, see Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1 (1972), and GUNTHER, CONSTITUTIONAL LAW 661 (9th ed. 1975).

31. Railway Express Agency v. New York, 336 U.S. 106 (1949).

Recent concern about the sufficiency of the two-tiered approach[32] has resulted in a third standard of review, which occupies a middle tier between the strict and minimal scrutiny standards.[33] In applying this intermediate standard, the state's enunciated purpose must be important, and the means used must be "substantially" related to the achievement of this purpose.[34] Unlike strict scrutiny, the governmental interest does not have to be compelling; unlike minimal scrutiny there must be more than mere "reasonableness" in the means used by the government. This test generally has not been applied outside the area of sex discrimination, therefore its applicability to other equal protection clause violations is not yet known.

B. *Which Tier for Benign Classifications?*

Generally, strict scrutiny is applied to any racial classification, and Justice Powell used this test in *Bakke*. Powell based his standard of review on what he identified as the evils of racial preference in a multi-ethnic society:

> [T]here are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that so-called preference is in fact benign. . . . Second, preferential programs may only reinforce common stereotypes . . . Third, there is a measure of inequality in forcing innocent persons in respondent's (Bakke's) position to bear the burdens of redressing grievances not of their making.[35]

Justice Powell rejected the University's claim that the Court has sanctioned preferential classifications in past decisions, saying "But we have never approved preferential classifications in the absence of proven constitutional or statutory violations."[36] He applied the strict scrutiny standard and found a compelling state interest in the maintenance of a diverse student body, but identified a less restrictive means of reaching that interest in an admissions plan that did not have a strict quota based on race. The Harvard admissions plan was used as an example of this kind of selection process.[37] The availability of a less restrictive means of accomplishing the legitimate objective resulted in the UCD admissions program being ruled unconstitutional.

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32. Some new standards have been suggested by the Supreme Court Justices. For example, in his dissent in San Antonio v Rodriguez, 411 U.S. 1, 98 (1972), Justice Marshall called for a reappraisal of the Court's adherence to the rigid two-tiered test:

> A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

In a concurring opinion in Craig v. Boren, 429 U.S. 190 (1976), Justice Stevens suggested only one standard of review.

33. GUNTHER, CONSTITUTIONAL LAW 763 (9th ed. 1975).

34. Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677, 683-4 (1973). *See* note 48, *infra*, and accompanying text.

35. 438 U.S. 298.

36. *Id.* at 302.

37. The difference between the Harvard Plan and the UCD Plan is that the Harvard system for guaranteeing a diversified student body does not include announced rigid mathematical quotas. In seeking a diversified student body, the Harvard College admissions committee considers a number of factors which include socio-economic background, geographic region, and race. The official policy statement is that "race" is never the sole factor in determining whether a candidate will be admitted. 438 U.S. 316.

The joint opinion disagreed with the use of the strict scrutiny standard for benign racial classifications and argued for an intermediate level of scrutiny. Use of the intermediate standard was based on the idea that strict scrutiny is applied to racial classifications that stigmatize and stereotype ethnic groups. Since benign classifications are not based on a presumption of inferiority, they should be treated differently. Further support for the use of the intermediate standard is seen in the fact that Whites as a class do not have any of the "traditional indicia of suspectness" that results from unequal treatment or political powerlessness.

The Justices concluded that their review should be strict, but not so strict that the classification could not exist for any reason. An "important and articulated purpose" would validate the use of the classification.[38] As the joint opinion broke new ground by applying this standard to racial classifications, its analysis deserves careful consideration.

The Justices subjected the program to a two-prong test in order to determine its validity. Prong one asks whether the state action is reasonable in light of its purpose; prong two examines whether the state action stigmatizes any group. The state's interest in remedying the effects of past societal discrimination was recognized as being an important purpose under the first prong of the Court's test. Underrepresentation of minorities in the medical profession, the likelihood that the underrepresentation would continue without a special admissions program, and overwhelming evidence of past purposeful societal discrimination all justified the reasonableness of the use of a racial classification.

The joint opinion did not consider it necessary to have judicial, legislative or administrative findings of past discrimination, as did Justice Powell. Rather, they concluded that UCD could itself remedy past societal discrimination "where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School."[39]

In applying the second prong of their test, the Justices first noted that there was no claim that the program stigmatized Bakke in the same way that racial discrimination had stigmatized Blacks, nor was there any evidence that the Davis program disadvantaged or stereotyped the preferred minority groups. The Justices felt the program was reasonable in light of its purpose because application of criteria used in other admissions programs, *e.g.*, classifying applicants on the basis of economic disadvantage, would be less effective. Finally, the Justices asserted that the only difference in the goals of the Davis and Harvard plans was that the Davis plan pursued them openly.

C. *The Preferred Test*

The analytical approach of Justices Brennan, Marshall, White, and Blackmun should be preferred over Justice Powell's approach because Bakke's claim does not fit conveniently into the prior framework for analyzing equal protection violations. Bakke is White, but traditionally, claims of racial discrimination under the equal protection clause have come from

38. 438 U.S. 361.
39. 438 U.S. 362.

members of minority groups[40] for whom the clause was originally intended to protect.[41] Thus, automatic application of the strict scrutiny test is unwarranted.

The intermediate standard allows the Court to consider benign governmental actions differently from invidious discrimination against racial minorities, thus avoiding a *per se* approach to racial classifications. This is consistent with the Court's previous holding that a law will not be held unconstitutional "*solely* because it has a racially disproportionate impact."[42] Recognizing the inherent inequalities in government regulations, the Court has held in the past "that a law . . . serving ends otherwise within the power of government to pursue is not invalid under the equal protection clause simply because it may affect a greater proportion of one race than another."[43] Since a *per se* approach is not utilized when a racially disproportionate impact is found, a *per se* test should not be resurrected when a racial classification is involved. This would seem particularly so when the racial classification clearly has a benign purpose.[44] In the case under discussion, Bakke failed to show that he was the object of intentional and invidious discrimination, thereby obviating the need to follow a *per se* approach.

Additionally, as the sex discrimination cases illustrate, the intermediate standard of review grew out of the need to uphold benign classifications, while continuing to outlaw stereotypical ones. All governmental classifications based on sex do not operate to stigmatize or stereotype women, but some do have a benign purpose of removing the inequality between men and women which has resulted from decades of treating women as inferiors.[45] Similarly, racial classification, at least in the last decade, has been used to favor minorities rather than to stigmatize them. The intermediate

40. Washington v. Davis, 426 U.S. 229 (1976) (hiring); Swain v. Alabama, 380 U.S. 202 (1964) (racial makeup of juries); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (drawing city boundaries to influence election results).

41. *See, e.g.*, the Civil Rights Cases, 109 U.S. 3, 22-25, where the Court recognized the purpose of the thirteenth and fourteenth amendments was to wipe out overt incidents of state discrimination resulting from the previous history of slavery.

42. Washington v. Davis, 426 U.S. 229, 239 (1976).

43. *Id.* at 242.

44. Justice Tobriner, in his dissent in the California Supreme Court's decision supports this view: "The *Washington* court's explicit approval of benign racial classifications cannot be reconciled with the majority's present assertion that all such racially 'non-neutral' efforts are presumptively unconstitutional." 18 Cal. 3d at 66, 553 P.2d at 1178, 132 Cal. Rptr. at 706.

45. While the Court has not applied the strict scrutiny standard of review to sex discrimination cases, it has often given these cases more than the rational relationship protection. In Reed v. Reed, 404 U.S. 71 (1971) the Court refused to accept a state statute which gave men a preference over women as administrators of estates, even though it was recognized that men, more often than women, would be more qualified. In Craig v. Boren, 429 U.S. 190 (1976) a state law prohibited the sale of beer to males under the age of 21 and to females under the age of 18. The Court ruled that the sex-based distinction was unconstitutional, because it was not substantially related to the state's objective. But when the sex-centered generalization is based on fact, the classification is allowable. In Kahn v. Shevin, 416 U.S. 351 and Schlesinger v. Ballard, 410. U.S. 498 (1975) gender-based classifications were upheld because of their "laudatory" purposes in remedying disadvantageous conditions suffered by women in economic and military life. The Court in *Schlesinger* felt it was "quite rational" for Congress to fashion a rule which was to help women obtain promotions because "women line officers had less opportunity for promotion than did their male counterparts." *Id.* at 508. Even though this case was based on the due process clause of the fifth amendment, the Court in Craig v. Boren recognized the applicability of the standard in equal protection cases. 429 U.S. at 198 n.6.

standard of review, while still an emerging doctrine, allows for a distinction to be made between invidious discrimination and benign classifications. Therefore, the test is a more useful one than the strict scrutiny test, which does not accomodate less odious classifications.

V. PERPETUATING A FALLACY

It has been observed that "the Constitution of the United States is not a mere lawyer's document: it is a vehicle of life, and its spirit is always the spirit of the age."[46] The question becomes which opinion—the Powell opinion or the joint opinion of Justices Brennan, White, Marshall, and Blackmun—accurately reflects the spirit of the age.

Justice Powell's opinion, frought with a number of inaccurate statements about America's multi-ethnic society, certainly does not reflect the spirit of the age. His failure to understand the particular needs of the Black community and his interpretation of the fourteenth amendment are the result of two major errors—a melting pot analysis of American society and an inappropriate analysis of what he considers to be the dangers of racial preference.

Justice Powell's perception about the American melting pot is wholly inconsistent with current societal trends. "During the dormancy of the Equal Protection Clause, the United States became a nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices . . . of a 'majority' composed of various minority groups. . . ."[47] Powell is referring to the idea that people with European ancestry have been kept out of managerial positions because of their religious beliefs and national origins.[48] Powell continued this analysis saying:

> [T]he white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a new minority of white Anglo-Saxon Protestants.[49]

This analysis fails to recognize the legitimate claim that Blacks have a more difficult struggle in attempting to undo the ingrained discrimination caused by the relics of slavery. The struggle for Black Americans is not only for promotion in jobs, but also for access to the basic ingredients for happy and productive lives. As Justice Marshall points out in his separate opinion, the statistical differences between Blacks and the rest of American society in infant mortality, education, and jobs reveals a great disparity. The immutable characteristics of Black Americans, along with the history of slavery and purposeful discrimination,[50] make it a mockery to suggest that other minorities share the same burden. Justice Powell's melting pot view of American society is only a hope.

Justice Powell's second error is reflected in his criticisms of preferential

46. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES, 69 (1911) as quoted in Univ. of California v. Bakke, 438 U.S. 265, 408 (Blackmun, J., concurring and dissenting).
47. Univ. of California v. Bakke, 438 U.S. 265, 292.
48. *Id.*
49. *Id.* at 295-96.
50. 438 U.S. 265.

admissions programs. He argues that the programs tend to reinforce stereotypes about groups benefiting from them.[51] Three observations seem appropriate here. First, as Blackmun points out in his separate opinion, "[G]overnmental preference has not been a stranger to our legal life."[52] Preference is used in progressive income tax, aid to the handicapped programs, and veterans' employment programs.[53] The degree of stereotyping attached to these groups is debatable.

Second, even if stereotyping does exist, there is no basis for it. As pointed out in the joint opinion:

> Once admitted, these students must satisfy the same degree requirements as regularly admitted students; they are taught by the same faculty in the same classes; and their performance is evaluated by the same standards by which regularly admitted students are judged. Under these circumstances, their performance and degrees must be regarded equally with the regularly admitted students with whom they compete for standing. Since minority graduates cannot justifiably be regarded as less well qualified than nonminority graduates by virtue of the special admissions program, there is no reasonable basis to conclude that minority graduates at schools using such programs would be stigmatized as inferior by the existence of such programs.[54]

Finally, the burden of an unfounded stereotype is certainly less of a burden on Black students than the continuation of unequal treatment. It would be far better to have a representative number of Blacks admitted to schools through special programs than to have only a few. The societal harm that results from too few Blacks matriculating in higher educational settings is greater than the harm which results from any purported stigma which might be attached to participatcn in a special admissions program.

Justice Powell also criticizes preferential admissions programs insofar as they make Whites, such as Bakke, suffer for injustices not of their making.[55] The Court has considered this issue before in school desegregation, employment and sex discrimination cases. For example, in *Swann v. Board of Education*[56] the Court held that "[T]he task is to correct, by a balancing of individual and collective interests, the condition that offends the Constitution."[57] The history of denying Blacks equal access to the universities is a condition that is offensive to the Constitution. Apparently, to UCD, the interest in correcting the past mistreatment of Blacks is greater than Bakke's individual interest. Besides what he termed a fundamental inequity, Powell's only quarrel with this comparison to school desegregation, employment and sex discrimination cases is that these cases involved findings of previous constitutional violations determined by administrative or judicial decisions.[58] In making these decisions, the burden on the individual versus the benefits to society as a whole was discussed.[59] It is significant that Powell

51. 438 U.S. 298, 98 S.Ct. at 2753.
52. *Id.* at 406.
53. *Id.*
54. *Id.* at 376.
55. *Id.* at 298.
56. 402 U.S. 1 (1971).
57. *Id.* at 16.
58. 46 U.S.L.W. at 2753-5.
59. *See* Swann v. Bd. of Education, 402 U.S. 1, 16 (1971) and Brown v. Bd. of Education, 349 U.S. 294, 299-300 (1955).

does not criticize how this problem was handled previously.

For the foregoing reasons, Powell's analysis fails to take into account the special needs of America's most persecuted minority and therefore fails to conform to the spirit of the age. Because of these flaws in Powell's analysis, it is no wonder that he cannot understand why the collective rights of one of America's minority groups should predominate over Bakke's individual rights.

VI. CONCLUSION

Equal protection of the laws in an unequal society is a paradox which has been furthered by the holding in the *Bakke* case. Although America is a multi-ethnic society, equality is divided along *color* lines—not necessarily ethnic group membership. The disproportionate discriminatory treatment against Blacks in the United States is so pervasive that remedies, including affirmative action programs, must be created—even though they arguably may impinge upon the rights of other individuals—in order to correct the effects of prior discrimination.

Fortunately, the holding in *Bakke* does not sound a death knell for affirmative action programs. The holding merely prohibits the use of racially based quotas *absent* a finding of prior discrimination. Racial classifications fashioned to remedy either a judicial or administrative finding of discrimination have been upheld by the Court and are not overruled by the *Bakke* decision. Affirmative action programs that do not use race as the sole determinative factor also are not invalidated by this decision. While the clock has not been turned back, the goal of equality for all people is more distant. The potential benefits of a more effective quota program have been lost through this decision.

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